

AMERICAN ARBITRATION ASSOCIATION
230 SOUTH BROAD STREET, 12TH FLOOR
PHILADELPHIA, PA 19102-4106

Case No. 14 390 00735 13

In the Matter of Arbitration Between
CITY OF PHILADELPHIA,

Employer,

and

FRATERNAL ORDER OF
POLICE, LODGE #5,

Union.

OPINION
AND
AWARD

ARBITRATOR:

Robert E. Light, mutually chosen
by the parties pursuant to the
rules and regulations of the
American Arbitration Association

HEARING:

May 8, 2014 in Philadelphia, PA.

APPEARANCES:

For the City

Benjamin D. Salvina, Esq.
William Fernandez, Esq.
Cpt. Gregory Malkowski

For the Union

Marc Gelman, Esq. (Jennings Sigmond, PC)
John McGrody, Union Representative
Sgt. Nashid Akil, Grievant

ISSUE:

Was there just cause for the 10 day suspension
imposed on Sergeant Akil? If not, what shall
be the remedy?

BACKGROUND

A hearing in this matter was held at the offices of the American Arbitration Association, Philadelphia, Pennsylvania on May 8, 2014 with both sides present and duly represented by counsel and where both parties were afforded full and complete opportunity to offer evidence and argument in support of their respective contentions. As was arranged at the hearing, subsequent to its completion, both counsel filed post-hearing briefs, after which time the hearing was declared closed.

The City of Philadelphia (hereinafter the "City" or the "Employer") and FOP Lodge #5 (hereinafter the "Union" or "FOP") are signatories to a current collective bargaining agreement and have been in a contractual relationship for many years. A grievance was filed by the FOP on behalf of Sgt. Nashid Akil which grievance protested the 10 day disciplinary suspension imposed upon him. Specifically, the Notice of Suspension without pay reads as follows:

FAILURE TO SUPERVISOR, Section 8-§003-10: Failure to properly supervise subordinates

In that on Saturday, July 9, 2011 at 5:00 PM, police responded to [REDACTED] to Meet a Complainant. Officers T [REDACTED] G [REDACTED] and J [REDACTED] M [REDACTED] were met by W [REDACTED] W [REDACTED] who wanted to retrieve belongings from this address, occupied by her ex-husband, B [REDACTED] W [REDACTED]. Both W [REDACTED] W [REDACTED] and B [REDACTED] W [REDACTED] had valid PFA Orders. Mr. W [REDACTED] order specified that Ms. W [REDACTED] was evicted and excluded from [REDACTED] but may enter on July 7, 2011, 4:30 PM to 6:30 PM, to retrieve her personal belongings. The officers were aware of this provision but were permitting Ms. W [REDACTED] to enter the property in violation of the PFA. Mr. W [REDACTED] objected and called for a supervisor. You responded, and after assessing the situation, continued to allow Ms. W [REDACTED] to violate the active PFA order by allowing her to enter the property and gather her belongings.

The matter was grieved, proceeded through the grievance procedure and when there was no resolution it was submitted to the undersigned as arbitrator for final and binding resolution.

FACTS

The events in question occurred on July 9, 2011. Previously, namely on July 1, 2011, the Philadelphia Court of Common Pleas by Judge Chen issued a temporary Protection From Abuse Order (PFA) on behalf of W [REDACTED] W [REDACTED] against B [REDACTED] W [REDACTED]. A few days later Judge Chen issued a different temporary PFA Order on behalf of B [REDACTED] W [REDACTED] against W [REDACTED] W [REDACTED]. That order stated that W [REDACTED] W [REDACTED] could enter the residence to retrieve her belongings on July 7, 2011 from 4:30 PM to 6:30 PM.

On July 9, 2011, Police Officers T [REDACTED] G [REDACTED] and J [REDACTED] M [REDACTED] responded to a request by W [REDACTED] W [REDACTED] to retrieve her belongings from the resident occupied by her ex-husband B [REDACTED] W [REDACTED]. Sgt. W [REDACTED] directed Officers M [REDACTED] and G [REDACTED] to accompany Ms. W [REDACTED] to [REDACTED] in order to collect items from the home. Sgt. W [REDACTED] told the officers that a temporary Protection From Abuse Order had been entered against Ms. W [REDACTED] and therefore she required police accompaniment at her former home in order to retrieve her property. It appears that the relationship between the W [REDACTED] was highly contentious and police had responded to their home on a number of occasions.

Officers M [REDACTED] and G [REDACTED] met Ms. W [REDACTED] at her home as directed by Sgt. W [REDACTED] and the officers spoke with Mr. W [REDACTED] who was there as well. While Mr. W [REDACTED] initially granted Ms. W [REDACTED] permission to enter their home in order to retrieve her belongings, later on Mr. W [REDACTED] changed his mind with him becoming angrier and agitated, with a strong odor of alcohol on his breathe as well as yelling profanities at the officers and Ms. W [REDACTED]. That being so, the officers called for backup and the grievant responded encountering some detours which delayed his arrival it appears. In any event, the grievant testified that when he arrived at the scene he observed Mr. W [REDACTED] arguing with the officers while Ms. W [REDACTED] was in the residence gathering her

belongings. He stated that he tried to calm him down and even released the extra police officers who had arrived in order to provide Mr. W [REDACTED] some sense of comfort. In any event, the grievant became aware of the existence of a PFA but did not read it or pass judgment upon it since his goal was to back up the officers. He further stated that he was told that Sgt. W [REDACTED] had read the PFA and that he ordered Officers M [REDACTED] and G [REDACTED] to accompany Ms. W [REDACTED] to the home. As he explained at the hearing, he was there for the express purpose of officer backup and encountered a hostile situation which had the potential to compromise the safety of the officers. He believed that his sole purpose was to maintain order. In that regard, the facts indicate that the grievant was there for a very short period of time approximating some 10-15 minutes.

At the hearing, the grievant testified that he understood Directive 90 and that it would have taken him a few minutes to verify Mr. W [REDACTED] order over a police radio but that he did not do so. Once again, it was his belief that his main concern there was to quell what could have been a situation that was getting out of order.

The City commenced an investigation of the incident on July 26, 2011. Lt. Jacqueline Pittman was assigned to the investigation and she interviewed E [REDACTED] W [REDACTED], the responding officers and the grievant. It was her testimony that the grievant admitted that he did not review or verify either of the PFA orders. Based on the language in Directive 90, along with the grievant's statement that he did not verify B [REDACTED] W [REDACTED] PFA order, Lt. Pittman concluded that the grievant violated Directive 90 by failing to verify B [REDACTED] W [REDACTED] PFA order and by allowing W [REDACTED] W [REDACTED] to violate this order and remain in the residence. Based upon this incident, and in conjunction with a prior incident involving the grievant, he was suspended for 10 days for failure to supervise.

POSITION OF THE CITY

The City takes the position that it had just cause to suspend the grievant for 10 days. It maintains that the grievant violated Directive 90 as well as permitting Ms. W [REDACTED] to violate a court order. Directive 90 reads, in relevant part:

II., B. Under the Protection From Abuse Act §6113 an arrest for violation of an order may be made without a warrant upon probable cause whether or not the violation is committed in the presence of the police officer. The police officer may verify, if necessary, the existence of a protection order by telephone, or radio communication with the appropriate police department, state or county registry, or issuing authority. Orders issued within Pennsylvania can be accessed through PCIC. A police officer shall arrest a defendant for violating an order issued under this chapter by a court within the judicial district, issued by a court in another judicial district within this Commonwealth or issued by another state and registered pursuant to this chapter or verified through the Pennsylvania State Police Registry. Orders issued outside of Philadelphia are to be honored and enforced. These orders will be processed just as an order issued within Philadelphia. Orders issued outside of Pennsylvania can be accessed by running the parties through the NCIC system.

V., D. If the victim or complainant states that there is a Protection From Abuse Order and the defendant is on location, in addition to any action taken under Section IV the officer will (See Decision Guide Flowchart "C"):

1. Contact PCIC via Police Radio to verify the validity of the Protection From Abuse Order and ascertain the scope of protection provided by the order. If a violation has occurred, arrest the defendant and transport him/her to the detective division of occurrence. Ensure that you have read the order carefully, noting all of the provisions of the order prior to taking action.
2. If, after checking the Protection From Abuse Order through NCIC/PCIC, it is determined that the order is not listed in the ABUSE file or NCIC, and the complainant's copy of the order is dated within the last five days, transport the defendant and complainant to the detective division of occurrence for further investigation.

The City maintains that the 10 days meted to the grievant was appropriate given the fact that he both violated Directive 90 and permitted Ms. W [REDACTED] to violate a court order. It dismisses the Union's argument that the grievant needed to ensure the safety of his officers plus he was dealing with the belligerent B [REDACTED] W [REDACTED] and was unable to verify the PFA order. In that regard, the City maintains that the grievant's testimony was not credible. He could have and should have verified the PFA order and his failure to do so is inexcusable. Further, the City contends that the grievant believes that he did nothing wrong by ignoring Directive 90 and by allowing an abuser to violate a valid PFA order. It asks that the grievance be denied and that the penalty imposed be affirmed by this arbitrator.

POSITION OF THE FOP

The Union, on the other hand, argues that the grievance should be sustained and that the suspension of Sgt. Akil should be rescinded, that he be made whole, that his record be expunged of any reference of the discipline, with the arbitrator retaining jurisdiction with respect to remedy. (Union brief pg. 10). Union counsel argues that the grievant did not fail to properly supervise Officers G [REDACTED] and M [REDACTED] and there was no violation of the Disciplinary Code. It maintains that the grievant was called to and arrived at the scene for the sole purpose of officer backup which was instigated through a call patched through to the grievant during which he personally heard a great deal of screaming and a distressed officer calling for assistance. (Union brief pg. 6). As the grievant testified, counsel maintains that maintaining order was "paramount" and that it was for this reason that the grievant took little interest in the contents of the PFA order. It points out to this arbitrator that the grievant was aware that another Sergeant had reviewed the PFA and ordered the appropriate follow up. Finally, the Union maintains that this

case is about a misplaced assignment of blame for what appears to have been a simple mistake made by another Sergeant in the grievant's District. It asks that the grievant be sustained.

DISCUSSION

The arbitrator has carefully weighed all of the evidence in the case including the testimony of the witnesses at the hearing, the arguments of respective counsel as set forth both at the hearing and in their post-hearing briefs, the contract and exhibits prior to reaching his decision. Initially, the arbitrator notes what this case involves. Specifically, Sgt. Akil was suspended for 10 days for alleged violations of Philadelphia Police Department's Disciplinary Code for failure to supervise. In reality, in the opinion of this arbitrator, it was Sgt. W [REDACTED] who had "screwed up." That is to say, it appears that when the grievant arrived on the scene to restore order, he was aware that Sgt. W [REDACTED] had reviewed the PFA and apparently had ordered the appropriate follow up. While, to be sure, in hindsight the better approach would have been for the grievant himself to have reviewed the PFA and made his own independent findings, it seems reasonable to this arbitrator that the grievant relied upon Sgt. W [REDACTED] review. The question then becomes was the grievant guilty of "failure to supervise." While the City did not call Sgt. W [REDACTED] as a witness in this proceeding, the arbitrator is then faced with making a judgment on the facts, absent his testimony. In sum, while the grievant surely could have (and perhaps should have) properly reviewed the PFA, it is reasonable to this arbitrator that, on the unique facts presented, his failure to review of the PFA was understandable and not inappropriate. Therefore the arbitrator finds that the imposition of the discipline here was misplaced and that the grievant should be made whole.

Therefore, the undersigned having duly heard all of the proofs and allegations of the parties to this proceeding makes the following award:

AWARD

There was not just cause for the 10 day suspension imposed on Sgt. Akil. Sgt. Akil shall be made whole for the 10 days in question and his record shall be expunged of the 10 day suspension. Grievance granted.



ROBERT E. LIGHT, ARBITRATOR

AFFIRMATION

I, Robert E. Light, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Opinion and Award.

Dated: July 25, 2014



Robert E. Light, Arbitrator